Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:DET:POSTF102113-02
MTHammoud

date: 2/15/02

to: [redacted], **Team Coordinator**

from: **Associate Area Counsel, LMSB, Detroit, Michigan**

subject: [redacted] **- Statute Extension**

This memorandum responds to your request for assistance regarding the above subject. This memorandum should not be cited as precedent.

ISSUE

Who is the proper party to execute a consent for [redacted], a Non-TEFRA partnership[1], where two of the three partners involved are consolidated subsidiaries of The [redacted]?

CONCLUSION

For a Non-TEFRA partnership, the statute of limitations of each partner's return controls the flow-through entity issues in the partner's return. As the common parent of its consolidated group, The [redacted] should sign the consent to extend the statute of limitations, Form 872, for any partnership adjustments flowing from [redacted] to [redacted] and its consolidated subsidiaries. However, this consent will not serve as a waiver with respect to any other [redacted] partners and, thus, similar consents should be obtained for any partnership adjustments flowing to the other partners' returns.

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1 Based on the information available to us, it does not appear this partnership is subject to the provisions of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), (codified in sections 6221-6233 of the Internal Revenue Code), as it did not have more than 10 partners. Pursuant to I.R.C. § 6231(a)(1)(B)(i), a partnership of 10 or fewer partners is excluded from the definition provided by I.R.C. § 6231(a)(1)(A) for a partnership. However, such a partnership may elect to be covered by the TEFRA provisions. I.R.C. § 6231(a)(1)(B)(ii). There is no evidence such an election was made in this case.

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FACTS

The facts are as discussed during our meeting of January 10, 2002, our conversation of January 29 and February 13, 2002 with [redacted], and other information provided to our office on various occasions.

Exam is currently auditing the returns of The [redacted] (hereinafter [redacted]), for the [redacted] through [redacted] tax years. In the course of its audit, exam is also considering an issue relating to [redacted]'s involvement in a partnership, [redacted], for the [redacted] tax year.

The [redacted] issue was first raised in the [redacted] through [redacted] audit cycle, and relates to whether Dow properly deducted royalty payments made to [redacted] In [redacted] contributed to [redacted] fully amortized patents with a value of $[redacted], and [redacted] banks contributed $[redacted] in cash. The partnership agreements were drafted so as to protect Dow's rights in the patents (it would never have to lose them), and the banks were guaranteed a [redacted]% return on their money. [redacted] is the only party using the patents. Exam's position is that [redacted] formed [redacted] for the purpose of creating tax deductions by claiming large royalty deductions to [redacted] instead of non-deductible principal repayments. For [redacted] Exam is of the position these deductions are not allowed on the additional ground that [redacted] terminated under I.R.C. § 708(b) as a result of the reorganization described below.

Based on the copy of the [redacted] U.S. Partnership Return of Income (Form 1065) provided to us, [redacted] had the following 10 partners during the year[2]: 1) [redacted] Inc., the General Partner; 2) [redacted] ([redacted]) Corporation; 3) [redacted] Inc.; 4) [redacted] Corporation; 5) [redacted], [redacted]; 6) [redacted] 7) [redacted]; 8) [redacted]; 9) [redacted]; and 10) [redacted].

During [redacted], several transactions occurred in relation to the partnership interests in [redacted]. In [redacted] of [redacted], [redacted] and the [redacted] banks ([redacted], [redacted], [redacted], [redacted], and [redacted]) transferred their entire interest in [redacted] to [redacted], Inc. Then in [redacted] of [redacted], [redacted] ([redacted]) Corporation contributed some property in exchange for a limited partner interest; [redacted] retired the limited partner interest of [redacted] Corp.; and [redacted], Inc., sold a limited partner interest to [redacted].

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2 At the beginning of [redacted], [redacted] had [redacted] partners: [redacted] Corporation, both [redacted] subsidiaries, and the [redacted] banks.

As a result of the above transactions, [redacted] had three partners at the end of [redacted]:[redacted], Inc., [redacted] ([redacted]) Corporation, and [redacted][3]. Both [redacted] and [redacted] are subsidiaries of [redacted] and were included in [redacted]'s consolidated return for the [redacted] tax year. [redacted] is a domestic subsidiary of [redacted] Inc., and was included in [redacted]'s [redacted] consolidated return.

Because of the possible implications the [redacted] issues may have on the partners involved, Exam requested this office's advice about the proper party(ies) to extend the statute of limitations.

DISCUSSION AND ANALYSIS

As a general rule, I.R.C. § 6501(a) provides that tax must be assessed within three years of the filing date of the return. However, I.R.C. § 6501(c)(4) allows the Service, upon written consent of the taxpayer, to extend the time period in which to make an assessment or adjustment.

The regulations under section 6501(c)(4) of the Code do not specify who may sign consents executed under that section, but the Service will generally apply the rules applicable to execution of the original returns to consents. Rev. Rul. 83-41, 1983-1 C.B. 349. In addition, Section 6061 of the Code provides that any return, statement or document made under any internal revenue law must be signed in accordance with the applicable forms or regulations.

In a non-TEFRA partnership, the Service must obtain a consent from each partner in order to effect a waiver of the statute of limitations for assessments or adjustments. IRM Handbook 121.5, section1.12.9.2.1. In *Bufferd v. Commissioner*, 506 U.S. 523, 527 (1993), the Supreme Court stated "[the] return referred to in Code Sec. 6501(a) is the return of the taxpayer against whom a deficiency is assessed because the Commissioner can only determine whether the taxpayer understated his tax obligation and should be assessed a deficiency after examining his return." *See also Siben v. Commissioner,* 930 F.2d 1034 (2nd Cir. 1991), *cert. den.* 502 U.S. 963 (1991). Thus, in a non-TEFRA partnership the Service must obtain a waiver from each taxpayer partner in order to extend the statute of limitations.

Because [redacted] and [redacted] filed a consolidated return with [redacted], the consolidated return governs the statute of limitations for these entities.

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[3] These transactions also resulted in a compete turnover of the partners in [redacted] for the year. Moreover, from approximately [redacted] until approximately [redacted], the date of [redacted]'s purchase of a partnership interest, all partners in [redacted] ([redacted], [redacted] and [redacted]) were subsidiaries of [redacted].

Pursuant to Treasury Regulation section 1.1502-77(a), the common parent, with certain exceptions not applicable here, is the sole agent for each subsidiary member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. The common parent in its own name may give waivers, and any waivers so given, should be considered as having also been given or executed by each such subsidiary.

Accordingly, the common parent is the proper party to sign consents, including a Form 872 waiver to extend the period of limitations for all members in the group. The common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. § 1.1502-77(a). *See also Alumax Inc. and Consolidated Subsidiaries v. Commissioner*, 109 T.C. 133, 194 (1997) where the Tax Court found that Treasury Regulation § 1.1502-77(a),"designates the common parent of a group of corporations that files a consolidated return as the agent for those corporations in extending the period of limitations for the assessment of tax against any of those corporations, regardless whether any of them is required to file a separate return."

To properly execute the consent, the Service must obtain the signature of a duly authorized officer of [redacted] i.e., treasurer, assistant treasurer, chief accounting officer, etc . . Form 872 is the appropriate document to be used and requires no modification of the standard language, as [redacted] is neither a TEFRA partnership nor a federally registered partnership. In addition, the Service should ensure compliance with the notice requirement of section 6501(c)(4)(B) which requires the Secretary to "notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent." Failure to comply with this notice requirement could render the Form 872 execution unenforceable.

Finally, execution of Form 872 by [redacted] will extend the time period to make an assessment or adjustment flowing to only those entities that are subsidiaries of [redacted] In order to extend the statute of limitations against other partners, e.g., [redacted] additional consents must be obtained from those partners.[4]

This advice is subject to post review by our National Office and should not be relied upon for a period of 30 days.

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[4] Based on our conversation with [redacted] it is our understanding [redacted] filed a consolidated return with [redacted] Inc. If [redacted] is the common parent of its consolidated group, then the analysis made above with respect to [redacted] would equally apply to [redacted].

We hope the above fully addresses your concerns regarding this issue. Should you have any additional questions or require any further assistance, please feel free to contact the undersigned at (313) 237-6432.

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Associate Area Counsel
(Large and Mid-Size Business)

BY: ________________________
MESO T. HAMMOUD
Attorney (LMSB)